FILED
APR 30 1992
OFFICE OF THE CLERK

No. 91-1571

In the Supreme Court of the United States

OCTOBER TERM, 1991

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
CROSS-APPELLANTS

v.

BARBARA FRANKLIN, SECRETARY OF COMMERCE, ET AL.

ON CROSS-APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MEMORANDUM FOR THE EXECUTIVE BRANCH CROSS-APPELLEES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the three-judge district court correctly sustained the constitutionality of 2 U.S.C. 2a, which provides for apportionment of Representatives among the several States according to the mathematical formula known as the method of equal proportions.

2. Whether, if the district court correctly held that the manner in which the Secretary of Commerce included federal military and civilian personnel (and their dependents) stationed abroad in state apportionment counts violated the Administrative Procedure Act, 5 U.S.C. 706(2)(A), the relief ordered by the district court should be modified.

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1571

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
CROSS-APPELLANTS

v.

BARBARA FRANKLIN, SECRETARY OF COMMERCE, ET AL.

ON CROSS-APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MEMORANDUM FOR THE EXECUTIVE BRANCH CROSS-APPELLEES

Cross-appellants brought this action to challenge the reapportionment of the House of Representatives following the 1990 decennial census, under which Massachusetts received ten Representatives, a loss of one from the 1980 census. This cross-appeal is taken from the same judgment of the three-judge district court that is the subject of the direct appeal taken by the Secretary of Commerce and the other Executive Branch defendants below in *Barbara Franklin, Secretary of Commerce, et al.* v. *Commonwealth of Massachusetts, et al.*, No. 91-1502. The Court heard oral argument on that appeal on April 21, 1992.

1. Cross-appellants contended below that the equal proportions method prescribed by 2 U.S.C. 2a for apportioning Representatives among the States is unconstitutional. The three-judge district court rejected that contention. 91-1502 J.S. App. 27a-56a. Cross-appellants initially challenged that holding in the jurisdictional statement they filed to docket the instant cross-appeal. 91-1571 J.S. 9-22.* However, this Court has since sustained the constitutionality of 2 U.S.C. 2a in *United States Department of Commerce* v. *Montana*, 112 S. Ct. 1415 (1992). In light of *Montana*, cross-appellants have now expressly abandoned their challenge in this Court to the constitutionality of 2 U.S.C. 2a. See 91-1502 Mass. Br. 27 n.9.

2. Cross-appellants also contended below that the Secretary of Commerce improperly included in the census count for each State those federal military and civilian personnel stationed abroad who designated that State as their "home of record" when they entered military service, or who were found to have a sufficient nexus to that State under an alternative standard. The district court held that the Census Clause of the Constitution (Art. I, § 2, Cl. 3) and the Census Act (13 U.S.C. 141) permit the Secretary of Commerce to include federal personnel stationed abroad (and their dependents) in the state population totals on which the apportionment of Representatives is based. However, it held that the Secretary's manner of doing so following the 1990 census was arbitrary and capricious, in violation of the Administrative Procedure Act, 5 U.S.C. 706(2)(A), because he did not furnish an adequate explanation. 91-1502 J.S. App. 56a-84a. The Secretary of Commerce and the other

---

* Citations are to the typescript version of the jurisdictional statement on the cross-appeal.

Executive Branch defendants below challenge that holding in their direct appeal in No. 91-1502.

In this cross-appeal, cross-appellants address the relief ordered by the district court; specifically, they suggest that in order to meet concerns about the intrusiveness of the district court's judgment, the Court could modify that judgment to eliminate the relief entered against the President or (apparently) the other Executive Branch defendants. 91-1571 J.S. 22-25. Cross-appellants made the same point in their principal brief on our direct appeal. See 91-1502 Mass. Br. 111-114. They have filed this cross-appeal only as a protective matter, in the event the Court should conclude that such a modification is appropriate, but that cross-appellants could not request that disposition in defending the judgment below against our direct appeal. See 91-1571 J.S. 25; 91-1502 Mass. Br. 114 n.37.

We also have addressed the relief ordered by the district court in our briefs on the direct appeal. See 91-1502 Gov't Br. 29-32, 48-49; 91-1502 Gov't Reply Br. 15-16 & n.12, 19-20 & nn.14, 15. For that reason, and because the direct appeal is under submission, we shall not respond further here. Instead, we suggest that the Court hold the jurisdictional statement in this respect and dispose of it as appropriate in light of the Court's disposition of our direct appeal from the same judgment below.

CONCLUSION

On the first question presented, the judgment of the district court should be affirmed insofar as it sustains the constitutionality of 2 U.S.C. 2a. On the second question presented, the jurisdictional statement should be held and disposed of as appropriate in light of the disposition of the direct appeal in *Barbara*

Franklin, Secretary of Commerce, et al. v. *Commonwealth of Massachusetts, et al.*, No. 91-1502 (argued Apr. 21, 1992).

Respectfully submitted.

KENNETH W. STARR
Solicitor General

APRIL 1992